IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MIKE SALTS and MARIE SALTS,
individually and as officers of Salts Funeral Home PLAINTIFFS

v. Civil Action No. 1:99cv263-D-A

MICHAEL MOORE, ROGER CRIBB,
J.D. GARDNER, TONY LEE SHELBOURNE,
RICK WARD, LEE HARRELL, ELOISE McCRAINE,
GEORGE DALE, JOHN YOUNG, ARCH BULLARD,
TRAVIS CHILDERS, JIMMY MOORE,
JOE WAYNE GARNER, ROY GREEN, WILLIAM L.
McKINNEY, JERRY BARNES, KEITH LOVELL,
TIM HENDERSON, and PHILLIP DUNCAN
professionally, individually, jointly and severally DEFENDANTS

OPINION GRANTING IN PART AND DENYING IN PART
THE DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS
and GRANTING THE DEFENDANTS' MOTIONS TO STRIKE

Presently, before the court are the following motions: (1) the Defendants' Michael Moore, Roger Cribb, J.D. Gardner, Tony Lee Shelbourne, Rick Ward, Lee Harrell, Eloise McCraine, and George Dale, in their individual capacities,[1] and John Young and Arch Bullard in their official and individual capacities (collectively referred to as "State Defendants") motion for judgment on the pleadings pursuant to Rule 12(c) of the *Federal Rules of Civil Procedure*; (2) the Defendant, Phillip Duncan's motion for judgment on the pleadings pursuant to Rule 12(c) of the *Federal Rules of Civil Procedure*; (3) the Defendant, Phillip Duncan's motion to strike; and (4) the State Defendants' motion

[1] Plaintiffs' claims against Mike Moore, Roger Cribb, J.D. Gardner, Tony Lee Shelbourne, Rick Ward, Lee Harrell, Eloise McCraine, and George Dale, in their official capacities, were dismissed with prejudice by this court on April 25, 2000.

to strike the Plaintiffs' exhibits and parts of their brief filed in opposition to the State Defendants' motion for judgment on the pleadings. Upon due consideration, the court finds that the State Defendants' and Duncan's motions to strike shall be granted. Additionally, the State Defendants' motion for judgment on the pleadings shall be granted in part and denied in part. Finally, Duncan's motion for judgment on the pleadings shall also be granted in part and denied in part.

A. Factual Background

The facts of this case have been previously outlined by the court. See Salts v. Moore, et al, No.1:99cv263-D-A, (N.D. Miss. April 25, 2000). In the interest of convenience, the court will summarize the following facts: Plaintiffs filed the instant action on August 19, 1999, alleging, *inter alia*, constitutional violations under the Fourth and Fourteenth Amendments, violations of the Sherman and Clayton Acts, as well as various other claims arising under 42 U.S.C. §§ 1983 and 1985. Plaintiffs' claims principally arise out of an investigation conducted by the State of Mississippi Attorney General's Office which resulted in the arrest and prosecution of the Plaintiff, Mike Salts, for five counts of making and using false writings and documents with the intent to defraud in order to obtain county funds for "paupers funerals," in violation of Mississippi Code Annotated § 97-7-10. Salts pleaded guilty to all five counts.

At all times relevant to the case at bar, the Defendants presently before the court held the following positions: Michael Moore (Moore), Attorney General for the State of Mississippi; Roger Cribb (Cribb), Assistant Attorney General for State of Mississippi; J.D. Gardner (Gardner), Assistant Attorney General for the State of Mississippi; Tony Lee Shelbourne (Shelbourne), Investigator for the Attorney General for the State of Mississippi; Rick Ward (Ward), Investigator for the Attorney General for the State of Mississippi; Lee Harrell (Harrell), Special Assistant Attorney General for the State of Mississippi; Eloise McCraine (McCraine), Insurance Commission Chief Investigator for the State of Mississippi; George Dale (Dale), Insurance Commissioner for the State of Mississippi; John Young (Young), District Attorney for Prentiss County, Mississippi; Arch Bullard (Bullard), Assistant District Attorney for Prentiss County, Mississippi; and Phillip Duncan (Duncan), officer and/or agent of

Booneville Funeral Home.

B. Discussion

1. Motions To Strike

Duncan and the State Defendants both move the court to strike the Salts' exhibits and corresponding portions of their brief which they submitted with their response to the Defendants' motions for judgment on the pleadings. Upon due consideration, the court finds that these motions are well-taken and shall be granted.

The Salts submitted twenty-five exhibits to support their response to the Defendants' motions for judgment on the pleadings. In their brief, they talk about the exhibits and invite the court to convert the Defendants' Rule 12(c) motions into Rule 56 motions for summary judgment. The court declines to do so and finds that a Rule 56 motion would be premature in light of the current state of discovery. See Resolution Trust Corp. v. Scott, 887 F. Supp. 937, 940 (S.D. Miss. 1995). Accordingly, only those documents which are matters of public record or attachments to pleadings shall be taken into consideration in the court's analysis of the Defendants' motions for judgment on the pleading. All remaining exhibits shall be stricken.

2. State Defendants' Motion for Judgment on the Pleadings

a. Judgment on the Pleadings Standard

A motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is subject to the same standard as a Rule 12(b)(6) motion to dismiss. Resolution Trust Corp. 887 F. Supp. at 940 (quoting Thomason v. Nachtrieb, 888 F.2d 1202, 1204 (7th Cir. 1989)). Therefore, viewing all of the facts in a light most favorable to the non-moving party, the district court may only grant the motion if it is beyond doubt that the non-movant can plead no facts that would support his claim for relief. Id. If, however, a required element, a prerequisite to obtaining the requested relief, is lacking in the complaint, dismissal is proper. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986). The district court may not look beyond the pleadings, and all uncontested allegations to which the parties had an opportunity to respond are taken as true. Resolution Trust

Corp., 887 F. Supp. at 940 (quoting Flora v. Home Fed. Sav. & Loan Ass'n, 685 F.2d 209, 211 (7th Cir. 1982)). The court may, however, take into consideration documents incorporated by reference to the pleadings and may take judicial notice of matters of public record. Resolution Trust Corp., 887 F. Supp. at 940 (citing Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985); Louisiana ex rel. Guste v. United States, 656 F. Supp. 1310, 1314 n.6 (W.D. La. 1986)).

b. Fourth Amendment Claims

The Salts contend that Mike Moore and two investigators in his employ, Roger Cribb and J.D. Gardner violated their Fourth Amendment rights by "ordering and /or participating in the illegal search and seizure" of their business on September 24, 1996. The Defendants assert that the Salts' claims under the Fourth Amendment are barred by their qualified immunity from suit.[2] The court agrees.

It is well established that government officials performing discretionary functions are entitled to qualified immunity from individual capacity suits measured by the "objective legal reasonableness" of their actions asserted in light of "clearly established" constitutional law. Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Public officials are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The first step in the inquiry of a defendant's claim of qualified

[2] Additionally, the State Defendants argue that Mike Salts' claims are barred by the doctrine announced in Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). It is undisputed that Mike Salts pled guilty to five counts of making and using false writings and documents with the intent to defraud in order to obtain county funds for "paupers funerals," in violation of Mississippi Code Annotated § 97-7-10. Based on the principles provided in Heck, the Fifth Circuit has held that a § 1983 claim attacking the constitutionality of a conviction or imprisonment does not accrue until that conviction or sentence has been reversed or otherwise terminated in the plaintiff's favor. Hudson v. Hughes, 98 F.3d 868, 872 (5th Cir. 1996); see also Boyd v. Biggers, 31 F.3d 279, 283 (5th Cir. 1994). Based upon the indictment, it appears to the court that the evidence seized at the search of the funeral home was subsequently used during the criminal proceedings against Mike Salts. Thus, Mike Salts' success in his claims against the State Defendants would necessarily draw into question the validity of his conviction or sentence. He must, therefore, demonstrate that his conviction has been invalidated in order for the cause of action to accrue. See Heck, 512 U.S. at 486-87, 114 S. Ct. at 2372. He has made no such showing. Accordingly, the State Defendants are also entitled to judgment on the pleadings regarding Mike Salts' Fourth Amendment claims.

immunity is whether the plaintiffs have alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 230, 111 S. Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). This inquiry necessarily leads the court to the second step of the inquiry, which questions whether the officer acted reasonably under settled law in the circumstances with which he was confronted. Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L.Ed.2d 589 (1991); Lampkin v. City of Nacogdoches, 7 F.3d 430, 434 (5th Cir. 1993). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994). Thus, even if the State Defendants violated the Salts' constitutional rights, they are entitled to immunity if their actions were objectively reasonable. See Blackwell, 34 F.3d at 303.

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. From this constitutional protection, it is well-established that a warrantless search and seizure is unreasonable absent probable cause and exigent circumstances. See Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); Pray v. City of Sandusky, 49 F.3d 1154, 1158 (6th Cir. 1995). The Defendants submit, and the Salts offer no dispute, that a valid search warrant was issued and executed for the search of Salts Funeral Home. Indeed, the Salts make no allegation that the warrant was improper; rather they offer a blanket assertion that a search warrant was not presented to any officer of Salts Funeral Home.

Assuming Plaintiffs are alleging errors pertaining to the execution of the search warrant, the Fifth Circuit has explained that Fourth Amendment guarantees must be balanced with the efficient operation of the criminal justice system. Payne v. United States, 508 F.2d 1391, 1394 (5th Cir. 1975). To this end, there is no legal requirement that owners of property be present when the property is searched, and police officers may lawfully enter unoccupied premises to execute a search warrant. See id.; United States v. Major, 915 F. Supp. 384, 387-88 (M.D. Ga. 1996). Moreover, failure to present a copy of the search warrant to the party whose premises are searched does not invalidate the search in the absence of a showing of prejudice. See Walter v. United States, 447 U.S. 649, 657 n.10, 100 S. Ct.

2395, 2402, 65 L.Ed.2d 410 (1980) (failure to serve warrant on owner of property does not make execution of warrant unlawful); United States v. Marx, 635 F.2d 436, 441 (5th Cir. Unit B Jan. 1981); W. LaFave, Search and Seizure § 4.5(a) (1987) (serving copy of search warrant ministerial and failure to follow requirements does not void otherwise valid search).

Viewing all of the facts in a light most favorable to the non-movant, the court is of the opinion that the Salts have failed to allege a violation of a constitutional right. Based on the above authorities, the court concludes that the State Defendants' purported failure to present the search warrant to an officer of Salts Funeral Home did not invalidate the warrant and does not give rise to a constitutional violation. Furthermore, the court is of the opinion that even if the Salts had alleged a violation of clearly established constitutional rights, the acts of the State Defendants were objectively reasonable and did not rise to the level of a constitutional violation. See Malley v. Briggs, 475 U.S. 335, 345, 106 S. Ct. 1092, 1098, 89 L.Ed.2d 271 (1986) (issue is whether reasonably well-trained officer would have known that affidavit failed to establish probable cause and that he should not have applied for the warrant). Consequently, the Salts' Fourth Amendment claims for unreasonable search and seizure shall be dismissed.

c. Selective Prosecution[3] Claims

The Salts allege that Dale, Moore, Cribb, Gardner, Young, and Bullard "selectively investigated, prosecuted and/or deceptively testified" against Mike Salts in violation of his equal protection and due process rights. Specifically, Mike Salts claims that other funeral providers in the Prentiss County area violated the law with respect to the dispersal of state funds for pauper's funerals and that the State Defendants selectively investigated and prosecuted him.

In order to prevail on a claim of selective prosecution, a plaintiff must meet two

[3] Defendants correctly note that although both Plaintiffs assert claims for selective prosecution, Marie Salts was not prosecuted for any crime. Thus, she has no standing to bring a claim for selective prosecution and any such claim asserted by her shall be dismissed.

requirements, which the Fifth Circuit has characterized as a "heavy burden." United States v. Jennings, 724 F.2d 436, 445 (5th Cir. 1984); United States v. Ramirez, 765 F.2d 438,439 (5th Cir. 1985).

> First, he must make a prima facie showing that he has been singled out for prosecution although others similarly situated who have committed the same acts have not been prosecuted. Second, having made the first showing, he must then demonstrate that the government's selective prosecution of him has been constitutionally invidious. The showing of invidiousness is made if [he] demonstrates that the government's selective prosecution is actuated by constitutionally impermissible motives on its part, such as racial or religious discrimination.

Ramirez, 765 F.2d at 439-40 (internal citations and footnote omitted).[4]

Upon review of the pleadings in the case at bar, this court finds that Mike Salts has failed to allege facts sufficient to establish a prima facie case of selective prosecution. Viewing all of the facts in a light most favorable to Mike Salts, the court concludes that required elements, prerequisites to obtaining the requested relief, are lacking in the Complaint. Assuming, as Salts contends, that other similarly situated persons fraudulently received paupers funeral funds and were not prosecuted, at best Mr. Salts has demonstrated only the first prong of the test. He still falls markedly short of his burden of demonstrating that the prosecution was constitutionally invidious. Conclusory allegations of some unknown impermissible motive are insufficient to meet this burden. See id. at 440. Accordingly, Mike Salts' claim of selective prosecution shall be dismissed.

d. False Information Claims

The Salts allege that several of the State Defendants presented false information concerning their

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[4] In Jennings, the court emphasized:

> As a substantive matter, the constitutional authority to "take care that the laws [are] faithfully executed" is textually committed to the authority of the executive branch, and the authority of the executive branch to enforce the law in a selective fashion is legally unchallengeable absent proof by the defendant that the government has exercised its discretion upon an invidious basis such as race.

724 F.2d at 445 n.12 (internal citations omitted).

business to former customers and the Prentiss County, Mississippi, grand jury. Specifically, they allege that from May, 1996 to October 15, 1997, Cribb, Gardner, Shelbourne and Ward (investigators employed by the Mississippi State Attorney General's office) traveled door to door in and around Prentiss County, Mississippi, at the instruction of and in conspiracy with Moore, Young and Bullard, informing the Salts' policy holders that benefits through Salts Funeral Home and/or Northeast Mississippi Burial Association and/or Booneville Burial Association were of no value.

The State Defendants argue that the Salts' apparent defamation claims are time barred by Mississippi Code Annotated § 15-1-35, which provides a one year statute of limitations for such claims. The Salts respond that they have asserted no state law claims for defamation; rather they purport to allege violations of their federally protected rights pursuant to 42 U.S.C. § 1983.

Mississippi Code Annotated § 15-1-35 provides:

> All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

The court finds that to the extent the Salts are asserting state law claims of defamation for statements made by the State Defendants on or before October 15, 1997, the date of the Prentiss County grand jury hearing, those claims are time barred and shall be dismissed. See Ellisville State School v. Merrill, 732 So.2d 198 (Miss.1999) (generally, an action for libel or defamation accrues at the time of the first publication for public consumption, as the public is the custodian of one's reputation). The Salts' argument concerning deprivation of their federally protected rights pursuant to 42 U.S.C. §1983 will be considered under the heading of Fourteenth Amendment claims.

e. Fourteenth Amendment Claims

As a preliminary matter, the initial complaint was filed on August 19, 1999. Many of the paragraphs of the Second Amended Complaint fail to allege the dates of actions of various State Defendants. The controlling statute of limitations for all 42 U.S.C. §1983 claims is three years. See

Miss.Code Ann. §15-1-49; James v. Sadler, 909 F.2d 834 (5th Cir.1990). Accordingly, any claims which accrued prior to August 19, 1996, are time barred.

As to the remaining claims under 42 U.S.C. §1983, the court finds that considering only the pleadings in this action, and taking the facts alleged in the complaint as true, the State Defendants have failed to show that "it appears certain that the plaintiff[s] cannot prove any set of facts that would entitle [them] to the relief [they] seek." See C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir.1995). Additionally, the court finds that this issue is best addressed in a motion for summary judgment following discovery.

f. 42 U.S.C. § 1985 Claims

The State Defendants correctly argue that a claim under § 1985 is one based upon violation of the right to equal protection of the law. In order to maintain such an action, the Salts must first be able to establish "that some racial or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268, 113 S. Ct. 753, 758, 122 L.Ed.2d 34 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)). The Supreme Court has not specifically addressed the scope of the phrase "or perhaps otherwise class-based," but has intimated that gender-based discrimination is sufficient in addition to race-based claims. Bray, 506 U.S. at 273, 113 S. Ct. at 761.

In the case at bar, the Salts have made no allegation or reference to any type of class-based animus which would suffice to support an action for conspiracy under § 1985. The court finds that the Salts have failed to allege facts sufficient to state a claim for relief. Accordingly, their claims in this regard shall be dismissed.

g. Claims Against Defendants in their Official Capacities

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[5] As noted above, at all times relevant to the case at bar, John Young has held the position of District Attorney for Prentiss County, Mississippi and Arch Bullard held the position of Assistant District Attorney for Prentiss County, Mississippi.

The Salts have asserted claims against Young and Bullard in their official capacities.[5] Indeed, it appears well-settled that a suit against a state official in his or her official capacity is, in effect, not a suit against the official but rather against the official's office. As such, the suit is no different from one against the state itself. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 50 L.Ed.2d 471 (1977).[6] In Mississippi, the district attorney is considered a state official. Chrissy F. by Medley v. Mississippi Dep't of Public Welfare, 925 F.2d 844, 849 (5th Cir.1991).

As a matter of law, the constitutional immunity provided by the Eleventh Amendment bars suit in federal court or the imposition of any monetary liability against the named State agency or State officials in their official capacity. States and State agencies are immune from suit. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-98, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983); Hughes v. Savell, 902 F.2d 376 (5th Cir.1990). The Eleventh Amendment is an "explicit limitation" on the jurisdiction of a federal court, and it serves as "a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts." Pennhurst State School, 465 U.S. at 119-120. (Emphasis in original). This includes 42 U.S.C. §1983 suits. Id. at 120. Additionally, under 42 U.S.C. §1983 state officials who are sued in their official capacities are not "persons" for purposes of the suit because they assume the identity of the government that employs them. Hafer v. Melo, 502 U.S. 21, 27, 112 S. Ct. 358, 362, 116 L.Ed.2d 301 (1991)(citing Will, 491 U.S. at 71). Accordingly, Young and Bullard are entitled to judgment on the pleadings as a matter of law regarding the official

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[5] As noted above, at all times relevant to the case at bar, John Young has held the position of District Attorney for Prentiss County, Mississippi and Arch Bullard held the position of Assistant District Attorney for Prentiss County, Mississippi.

[6] The Supreme Court has made clear the law as to state officials sued in their official capacities, as opposed to individual capacities. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L.Ed. 389 (1945), the Court held:

> When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

capacity action against them and these claims shall be dismissed.

h. Sherman and Clayton Act Claims

The State Defendants assert that they are entitled to judgment on the pleading regarding the Salts' claims arising under the Sherman and Clayton Acts due to the Salts' failure to plead the essential elements of such a claim and by the doctrine announced in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Salts, in their reply memorandum, respond that they "at this time, have chosen not [to] argue their claims of equal protection and the Defendants' violation of the Sherman and Clayton Acts." Subsequently, the State Defendants assert that the Salts' have abandoned these claims and as such, they are entitled to judgment on the pleadings. The court finds that the State Defendants' are not entitled to judgment simply by default. Accordingly, an analysis of the Salts claims under the Clayton and Sherman Acts is appropriate.

Plaintiffs allege that "each Defendant's conduct was intentional and/or wanton, and committed in efforts to undermine and destroy the Plaintiffs and their businesses in direct violation of applicable antitrust laws . . . ." Second Amended Complaint, Count IV ¶ 84. In addition, the Salts seek to invoke section 4 of the Clayton Act (15 U.S.C. § 15) as a means to recover treble damages, costs, and attorney's fees for the Defendants' alleged violations. The Salts offer no indication whether their allegations are brought under section 1 or section 2 of the Sherman Act. The court will therefore address each provision.

Section 1 of the Sherman Act forbids contracts, combinations, or conspiracies in restraint of trade or commerce. 15 U.S.C. § 1; Johnson v. Hospital Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996). To prevail on a claim under section 1, a plaintiff must show that the defendants 1) engaged in a conspiracy, 2) that produced some anti-competitive effect, 3) in the relevant market. Johnson, 95 F.3d at 392. Plaintiffs bear the burden of proving each element of a section 1 violation. Id. (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 1567, 80 L.Ed.2d 2 (1984)); see also Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (plaintiff may not evade pleading requirements by alleging bare legal conclusion; if facts do not at

least outline violation of the Sherman Act, plaintiffs will get nowhere merely dressing them up in language of antitrust); Mover's & Warehousemen's Ass'n of Greater New York, Inc. v. Long Island Moving & Storage Ass'n, Inc., No. 98 CV 5373, 1999 WL 1243054, at *3 (E.D.N.Y. Dec. 16, 1999) (bare bones statement of conspiracy or of injury under antitrust law permits dismissal).

As to the first element, the Salts merely allege in broad and conclusory fashion that some of the Defendants conspired with each other. They make no specific allegations with regard to elements two and three. No anti-competitive effect in the relevant market is plead or demonstrated, and proof that the Salts have been harmed as individual competitors is insufficient to make out a § 1 claim. Mover's & Warehousemen's Association of Greater New York, Inc., 1999 WL 1243054, at 4 n.6, citing Capital Imaging Associates v. Mohawk Valley Medical Associated, 996 F.2d 537, 543 (2nd Cir.1993). There certainly is no rational economic motive for the State Defendants to conspire. Moreover, the Salts have not pled or alleged that the State Defendants had an economic motive of any kind. For sure, none of the State Defendants were in competition with the Salts at any time.

As for the alleged violation of § 2 of the Sherman Act on the part of the State Defendants:

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772 (5th Cir.1999), citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

To prevail on an attempt to monopolize claim under §2, the Salts must prove the following: (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Establishment of the dangerous probability of success prong requires inquiry into the relevant product and geographic market and into the defendant's economic power in that market. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S.Ct. 884, 892, 122 L.Ed.2d 247 (1993) citing Swift & Co. v. United States, 196

U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905). There are no allegations in the Second Amended Complaint that even remotely attempt to flesh out these three elements.

A conspiracy to monopolize claim can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the conspiracy; and (4) an effect upon a substantial amount of interstate commerce. Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc., 200 F.3d 307, 315 (5th Cir. 2000). Once again, the Salts' conclusory allegations of conspiracy aside, they fail to allege or show any effect on relevant markets or interstate commerce apart from their alleged damages as an individual competitor. The Salts, therefore, have failed to make out a prima facie case for violation of either sections of the Sherman Act.

Further, state action is generally exempted from the purview of the Sherman and Clayton Acts. In Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Court explained:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .A state may maintain a suit for damages under it . . not [because of] the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute. There is no suggestion of a purpose to restrain state action in the Act's legislative history. . . . That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.
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> Here the state command...is not rendered unlawful by the Sherman Act since, in view of the latter's works and history, it must be taken as a prohibition of individual and not state action.
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> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Id., 317 U.S. at 351-52 (citations omitted).

The only exception to the Parker doctrine applicable to the State Defendants involves cases in which the state actor is engaged in the commerce in question as a competitor. Jefferson County Pharmaceutical Association v. Abbott Laboratories, 460 U.S. 150, 103 S.Ct. 1011, 74 L.Ed.2d 882 (1983). The court is unable to see any rational economic motive for the State Defendants to conspire. There is no evidence that any of the State Defendants before the court were in competition with the Salts at any time prior to or during Mike Salts' arrest and prosecution. See Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp., et al., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (if claim makes no economic sense and conduct is consistent with other equally plausible explanations, conduct does not give rise to inference of conspiracy). Likewise, the court is of the opinion that the Salts have failed to establish any inference of conspiracy with respect to the State Defendants.

Further, a valid claim under the Clayton Act requires proof of an antitrust violation and injury. See 15 U.S.C. §15, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). As discussed above, the Salts have failed to show a material issue of fact as to the existence of a conspiracy among the State Defendants or that any act of the State Defendants was an antitrust violation. Accordingly, any claims under the Clayton Act must also fail.

i. Equal Protection Claims

The Salts aver that Dale and Moore acting individually and/or in conspiracy with each other, wrongfully refused to renew the insurance licenses held by the Salts. They argue that these acts violated their right to equal application of the insurance laws and regulations of the State of Mississippi. The Second Amended Complaint also alleges that Dale failed to "timely notify the Salts of either the lapse in either license, or the failure of Gulf National [Insurance Company] to timely pay fees on behalf of the Marie Salts as Gulf National had done previously." It is also alleged that on or about December 8, 1994, Marie Salts mailed her application to renew her license to Dale, that he ignored it, allowed her license to lapse, returned each of her attempted renewals to her, refused to renew her license, and has

yet to renew her license.[7] As set forth above, the Salts, in their reply memorandum, chose not to address the equal protection issue.

The court is of the opinion that this issue is best addressed in a motion for summary judgment following discovery. Considering only the pleadings in this action, and taking the facts alleged in the complaint as true, the court finds that the State Defendants have failed to show that "it appears certain that the plaintiff[s] cannot prove any set of facts that would entitle [them] to the relief [they] seek." See C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir. 1995). Accordingly, the State Defendant's motion for judgment on the pleadings is denied as to the Salts' equal protection claims.

3. Phillip Duncan's Motion for Judgment on the Pleadings

The Salts allege in their Second Amended Complaint that Phillip Duncan, officer and/or agent of Booneville Funeral Home, conspired along with Dale and Moore to deprive each of them of their insurance license in violation of the Salts' right to due process. Further, Duncan is alleged to have violated the Sherman and Clayton Acts. No attempt is made to involve Duncan in the Salts' Fourth Amendment claims or equal protection claims. Duncan asserts that the Salts' claims pursuant to 42 U.S.C. §1983 which have been brought against him are time barred and additionally, he is not a state actor. Further, he alleges that the Salts' claims pursuant to the Sherman and Clayton Acts should be dismissed as they have failed to allege a necessary element of the acts. The court finds that Duncan's motion shall be granted in part and denied in part.

As an initial matter, once again, the appropriate statute of limitations for a 42 U.S.C. §1983

[7] Further, the Salts allege that Cribb and Gardner acting separately and/or in conspiracy with and at the instruction of Moore, Young, Bullard and/or Dale, unequally and selectively investigated, prosecuted and/or deceptively testified against Mike Salts. The issues of selective prosecution and defamation were addressed previously in this order and the court will not address them additionally here.

claims is three years. See Miss.Code Ann. §15-1-49; James v. Sadler, 909 F.2d 834 (5th Cir.1990). Under the Salts' due process claims pursuant to §1983, the only allegations which concern Duncan is a meeting which took place on August 23, 1995 when "Duncan met George Dale regarding Salts Funeral Home." The original complaint in this case was filed on August 19, 1999, almost four years after this meeting. Accordingly, the court finds that those claims arising prior to August 19, 1996, are time barred. The court also notes that the Second Amended Complaint does charge Duncan with conduct within the three years prior to the filing of the complaint and any claims arising out of those actions shall not be time barred. Further, all allegations arising under the Fourteenth Amendment, as addressed earlier in this opinion, shall be allowed to proceed and may best be addressed in a motion for summary judgment.

Finally, the court finds that the Salts' have failed to allege necessary elements of their Sherman and Clayton Acts as discussed earlier in this opinion.[8] Accordingly, the Salts' Sherman and Clayton Act claims against Duncan shall be dismissed.

C. Conclusion

The Defendants' motions to strike the exhibits and parts of the brief which the Salts submitted in response to the Defendants' motions for judgment on the pleadings shall be granted. All portions of the exhibits and brief which are not public record or attached to pleadings shall be stricken. The Fourth Amendment claims for unlawful search and seizure asserted against the State Defendants shall be dismissed. The selective prosecution claims asserted against the State Defendants shall be dismissed. Any alleged defamation claims shall be dismissed as untimely. The Salts' 42 U.S.C. §1985 claims shall be dismissed. The Salts' claims against the Defendants, Young and Bullard in their official capacities shall be dismissed. The Salts' claims pursuant to the Sherman and Clayton Acts shall be dismissed as to

[8] Again, the Salts have chosen not to respond to the issues in the Defendants' briefs regarding the Sherman and Clayton Acts.

the State Defendants and Duncan. All claims arising under 42 U.S.C. §1983 which accrued prior to August 19, 1996, are time barred and shall be dismissed as to all Defendants. The Salts' Fourteenth Amendment claims which are not time barred and the Salts' equal protection claims shall be allowed to proceed.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of December, 2001.

_____
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MIKE SALTS and MARIE SALTS,
individually and as officers of Salts Funeral Home PLAINTIFFS

v. Civil Action No. 1:99cv263-D-A

MICHAEL MOORE, ROGER CRIBB,
J.D. GARDNER, TONY LEE SHELBOURNE,
RICK WARD, LEE HARRELL, ELOISE McCRAINE,
GEORGE DALE, JOHN YOUNG, ARCH BULLARD,
TRAVIS CHILDERS, JIMMY MOORE,
JOE WAYNE GARNER, ROY GREEN, WILLIAM L.
McKINNEY, JERRY BARNES, KEITH LOVELL,
TIM HENDERSON, and PHILLIP DUNCAN
professionally, individually, jointly and severally DEFENDANTS

ORDER GRANTING IN PART AND DENYING IN PART
THE DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS
AND GRANTING THE DEFENDANTS' MOTIONS TO STRIKE

Pursuant to an opinion issued this day, it is hereby ORDERED that:

1) the Defendants' Michael Moore, Roger Cribb, J.D. Gardner, Tony Lee Shelbourne, Rick Ward, Lee Harrell, Eloise McCraine, and George Dale, in their individual capacities, and John Young and Arch Bullard in their official and individual capacities, motion for judgment on the pleadings pursuant to Rule 12(c) of the *Federal Rules of Civil Procedure* (docket entry # 100) is GRANTED IN PART AND DENIED IN PART;

2) the Defendant, Phillip Duncan's motion for judgment on the pleadings pursuant to Rule 12(c) of the *Federal Rules of Civil Procedure* (docket entry # 103) is GRANTED IN PART AND DENIED IN PART;

3) the Defendants' motions to strike the Plaintiffs' exhibits and portions of their brief (docket entries # 109 & 110) are GRANTED;

4) Plaintiffs' exhibits which are not public record or attached to pleadings and portions of the Plaintiffs' brief which argues said exhibits are stricken;

5) Plaintiffs' defamation claims are DISMISSED WITH PREJUDICE;

6) Plaintiffs' Fourth Amendment claims of unlawful search and seizure are DISMISSED WITH PREJUDICE;

7) Plaintiffs' claims of selective prosecution are DISMISSED WITH PREJUDICE;

8) Plaintiffs' claims pursuant to 42 U.S.C. §1985 are DISMISSED WITH PREJUDICE;

9) Plaintiff's claims against the Defendants Young and Bullard, in their official capacity are DISMISSED WITH PREJUDICE;

10) Plaintiffs' claims pursuant to the Sherman and Clayton Acts are DISMISSED WITH PREJUDICE;

11) Plaintiff's claims pursuant to 42 U.S.C. §1983 which accrued prior to August 19, 1996, are time barred and are DISMISSED WITH PREJUDICE; and

12) Plaintiffs' claims pursuant to 42 U.S.C. §1983 which are not time barred and Plaintiffs' claims of equal protection shall proceed.

SO ORDERED, this the _____ December, 2001.

_____

Chief Judge